SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1118

ELDON STEELE,

Petitioner,

vs.

THE STATE OF NORTH CAROLINA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Jurisdiction.

The decision sought to be reviewed by this petition is that of the Supreme Court of the State of North Carolina, which is the highest court in said state, and is reported as In Re Eldon Steele, 220 N. C. 685, 18 S. E. (2d) 132.

There were only two questions presented to the court below for decision, and these questions, substantially similar, were whether or not petitioner had been deprived of his liberty without "due process of law," as guaranteed by the Fourteenth Amendment to the Constitution of the United States, and "contrary to the law of the land," as guaranteed by Article I, Section 17, of the Constitution of North Carolina (R. 10). The North Carolina Supreme

Court has held that these two terms are synonymous and interchangeable. *Parish* v. *East Coast Cedar Co.*, 133 N. C. 478, 483. Since the court below held that petitioner was lawfully in custody, it must necessarily have decided that no right guaranteed under the Fourteenth Amendment had been denied petitioner. Further, the Superior Court, to which application for the writ of *habeas corpus* was made, expressly held that the trial of petitioner was "unconstitutional and void, in violation of the Fourteenth Amendment to the Constitution of the United States" and that the trial and proceedings had thereunder "deprived the defendant, Eldon Steele, of his liberty without due process of law" (R. 13), and entered judgment discharging petitioner from custody (R. 13). The state Supreme Court reversed the judgment of the Superior Court (R. 18).

ARGUMENT.

I.

The fact that petitioner was subjected to the judgment of a court the judge of which had a direct, personal, substantial, pecuniary interest in finding him guilty, or in having him plead guilty, deprived petitioner of due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

It is an ancient maxim of law that no man ought to be the judge in his own cause, and this principle, a cornerstone of modern jurisprudence, finds expression in many of the State constitutions as well as in the Fourteenth Amendment. The leading case on this particular point is *Tumey* v. *Ohio*, 273 U. S. 510. The opinion was delivered by Chief Justice Taft, who laid down this clear rule of law:

> "But it certainly violates the Fourteenth Amendment, and deprives the defendant in a criminal case of due process of law, to subject his liberty or property

> to the judgment of a court, the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." 273 U. S. 523.

As pointed out in the opinion of the court below (R. 17), the facts in the instant case are different from those in the *Tumey* case in that petitioner in the instant case did not make formal objection to the disqualification of the judge who tried him; he had a right to a trial by a jury of six men, provided he first deposited with the trial judge the sum of $3.00 for jury fees; and he had a right to appeal to the Superior Court where he would be afforded a trial *de novo* before an impartial judge and jury. It is earnestly contended and respectfully submitted that to allow any of these facts to take the instant case out of the doctrine announced in the *Tumey* case would be to destroy completely the value of that doctrine.

> "Every procedure which would offer a *possible* temptation to the average man as judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law." (Italics supplied.) *Tumey* v. *Ohio*, supra.

Both the State and Federal courts are in conflict as to the meaning and application of the *Tumey* case. In 1927, soon after that case was decided by this Court, the Federal judges of the Eastern and Western Districts of Kentucky reached diametrically opposite conclusions as to its application to procedure under Kentucky law. In Ex Parte *Meeks*, 20 F. (2d) 543, (W. D. Ky.) the court held that petitioner was not entitled to a writ of *habeas corpus* when he sought it on the ground that the trial judge was disqualified to try him because of pecuniary interest in reach-

ing a conclusion against him. In Ex Parte *Baer*, 20 F. (2d) 912 (E. D. Ky.), under substantially similar facts, the court discharged the petitioner from custody upon return of the writ. In Ex Parte *Hatem*, Sixth Circuit Court of Appeals, 38 F. (2d) 226, the court held that petitioner who had been convicted by a judge who was disqualified by reason of pecuniary interest was entitled to discharge upon return of the writ, even though the judge had waived his right to fees in the trial of petitioner.

The State courts tend more to attempt to evade the doctrine of the *Tumey* case by seizing upon some inconsequential difference in facts to take the case at hand out of the doctrine. Generally speaking, the following cases seem to hold that the right to a trial *de novo* upon appeal, when exercised by the defendant, amply protects the rights of the accused and affords him due process of law, even though he has been theretofore tried by a disqualified judge, and though the jurisdiction upon appeal is purely derivative:

Hill v. *State*, 174 Ark. 886, 298 S. W. 321;
Hitt v. *State*, 149 Miss. 718, 115 So. 879;
State v. *Gonzales*, 43 N. M. 498, 95 P. (2d) 673;
Brooks v. *Potomac*, 149 Va. 427, 141 S. E. 249.

Two other State court decisions, however, hold that the right of trial *de novo* on appeal does not afford due process where the judge of the inferior tribunal is disqualified because of pecuniary interest. *Williams* v. *Brannen*, 116 W. Va. 1, 178 S. E. 67; Ex Parte *Kelly*, — Tex. Cr. —, 108 S. W. (2d) 728.

Another State court decision, *State* v. *Shelton*, 205 Ind. 416, 186 N. E. 772, holds that a fee of $1.50, dependent upon conviction, is so small as to bring the case within the maxim *de minimis non curat lex*, one of the recognized exceptions to the rule laid down in the *Tumey* case. Ex Parte *Kelly*, *supra*, however, holds that a similar fee of $3.85 does not

come within the aforesaid maxim, and that the *Tumey* case is applicable.

That a conflict exists between the holdings in the cases of *Tari* v. *State,* 117 Ohio St. 481, 158 N. E. 594, 57 A. L. R. 284, (which was relied upon by the Supreme Court of North Carolina in the instant case), and *Tumey* v. *Ohio, supra,* is recognized by the opinion in the case of *Re Von Uehn,* 27 Ohio NPNS 167.

The *Tari* case, which was a four to three decision of the Ohio Supreme Court decided subsequent to the *Tumey* case, rests upon the express holding that a judgment rendered by a judge who is disqualified to try a criminal case by reason of pecuniary interest, is merely voidable and not void, and is in direct conflict with the later decision and opinion of this Court in *Brown* v. *Mississippi,* 297 U. S. 278. The Ohio court made no distinction between disqualification of judges because of pecuniary interest and disqualification for other cause. This distinction is clearly recognized by Chief Justice Taft in the *Tumey* case at page 523 as follows:

> "All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters of legislative discretion."

And the holding of this court in the Brown Case was to the effect that a deprivation of due process in the trial court rendered the judgment void.

II.

The mere fact that an accused, who appears before a tribunal the judge of which is disqualified to proceed in the matter because of pecuniary interest, has the right to be tried by a jury of six, upon the deposit by him with the judge of the sum of $3.00 as jurors' fees, does not afford accused due process of law.

If petitioner had so desired, he could have demanded a trial by a jury of six jurors under Section 1501 of the Consolidated Statutes of North Carolina, but, under the provisions of Section 1506 of said Consolidated Statutes, it would be necessary for him to deposit the sum of three dollars with the said judge before he would even be entitled to a jury trial.

> "Counsel would avoid the maxim [that no man may be a judge in his own case] on the grounds that the accused may have a jury, instead of the magistrate to try him, and that the accused has the unrestricted right of appeal. Both of these grounds are unsubstantial. 'Trial by jury', in the constitutional sense, requires such a trial to be under the superintendence of a disinterested judge. Capital Traction Co. *v.* Hof, 174 U. S. 1, 13, 14, 19 S. Ct. 580, 43 L. Ed. 873." *Williams* v. *Brannen,* supra.

The decision of the Supreme Court of North Carolina on this phase of the instant case, though somewhat uncertain, is very probably in conflict with the applicable decisions of this court as well as the holdings in other state jurisdictions.

III.

The fact that petitioner had the right of appeal from the disqualified judge to the Superior Court, where he would be afforded a trial de novo before an impartial judge and jury, did not afford petitioner due process of law.

> "It is ordinarily cheaper to pay a moderate fine than to pay the expenses attendant upon appeal; for which reason many an innocent man has submitted to an unjust decision in an inferior court. Right of appeal does not meet the situation. The Constitution requires that the accused shall be tried before a fair and impartial tribunal in the first instance where he will not face the alternative of paying an unjust fine or of resorting to the delay, annoyance, and expense of an appeal."
> *Williams* v. *Brannen,* supra.

It seems that the decision of the Supreme Court of North Carolina is entirely based upon the assumption and holding (R. 17) that "even if the disqualification of the trial justice be conceded, by the clear weight of authority the effect would be to render his judgment voidable, and not void." Otherwise, the questions of waiver, estoppel and the right of appeal would not even be raised, for a void judgment, by every authority, may be disregarded entirely, or collaterally attacked, and no appeal therefrom is necessary. *Tari* v. *State,* supra; *Johnson* v. *Zerbst,* 304 U. S. 458. In the instant case, there is the additional fact that the time allowed by law for appeal and trial *de novo* (N. C. C. S., Sec. 1530) had expired (R. 8 & 9). This additional fact was also present in *Johnson* v. *Zerbst,* supra, and the court held that the denial by the trial court of constitutional rights deprives the trial court of jurisdiction.

In *Ex Parte Kelly,* supra, the petitioner had had the right to appeal to the County Court for a trial *de novo,* and it was held that this right did not prevent the trial by a

magistrate who was paid a fee for his services only upon conviction from being "at variance with constitutional guaranties."

The decision of the Supreme Court of North Carolina is in conflict with all of the above cited cases except the Tari Case, which it is submitted, is itself in conflict with the decisions of this court in the Tumey Case and in *Johnson* v. *Zerbst*, supra.

IV.

Where a trial judge is disqualified because of pecuniary interest, his judgment and the proceedings before him are null and void, and the offer of an accused to plead guilty to the charge against him does not remove the disqualification or confer jurisdiction upon said court to proceed with the trial.

That the judgment of, and the proceedings before, a judge who is disqualified because of pecuniary interest are null and void has been either expressly or inferentially held in the following cases:

Hans Nielsen, Petitioner, 131 U. S. 176.
Tumey v. *Ohio*, supra.
Johnson v. *Zerbst*, supra.
Powell v. *Alabama*, 287 U. S. 45.

It is quite obvious that a judge who is interested in finding the accused guilty is even more interested in having him plead guilty, if he could thereby vest himself with jurisdiction which he would not otherwise have; and if the judge had no jurisdiction and his judgment is constitutionally invalid, jurisdiction may not be conferred upon him by any act of the accused, even a plea of guilty. This is the express holding of *Re Von Uchn*, supra. To hold that the judge is disqualified from trying a defendant who pleads "not guilty" but may pass judgment upon one who

pleads "guilty," would be to place a premium upon an effort by the judge to get the accused to enter a plea of guilty, or to misinterpret a "not guilty" plea entered by the accused, regardless of whether or not accused is guilty.

This precise question, so far as we have been able to determine from the reported cases, has not been decided by any court except the Ohio intermediate court in the case cited in the preceding paragraph, and the Supreme Court of North Carolina in the instant case. These two decisions upon a question of interpretation of the due process clause of the Fourteenth Amendment are in direct conflict, and the matter should be finally determined by this court.

V.

Where there is a want of due process in the trial and proceedings upon which sentence of imprisonment is based, the accused may attack the judgment and sentence collaterally and secure his release from imprisonment by writ of habeas corpus.

> "It is firmly established that if the court which renders a judgment has not jurisdiction to render it, either because the *proceedings* or the law under which they are taken are unconstitutional, or for any other reason, the judgment is void and may be questioned collaterally, and a defendant who is imprisoned under and by virtue of it may be discharged from custody on *habeas corpus*. This was so decided in the cases of *Ex Parte Lange*, 18 Wall. 163, and *Ex Parte Siebold*, 100 U. S. 371, and in several other cases referred to therein." (Italics for "proceedings" supplied.) *Hans Nielsen, Petitioner*, supra.

This holding was reiterated by this court in the following cases:

Brown v. *Mississippi*, supra.

Johnson v. *Zerbst*, supra.

Smith v. *O'Grady*, 312 U. S. 329.
Mooney v. *Holohan*, 294 U. S. 103.
Moore v. *Dempsey*, 261 U. S. 86.

The decision of the Supreme Court of North Carolina in the instant case held that a judgment of a judge disqualified because of pecuniary interest is merely voidable and not void, and is not subject to attack by habeas corpus (R. 17).

Conclusion.

"We have here a challenge to a part of the judicial system of the state" (R. 15). Thus the importance of the instant case to the people of North Carolina was indicated by the Supreme Court of North Carolina in the opinion rendered below. It is equally of vital importance to the people of all the states whose courts of last resort have failed or refused to follow the Tumey Case. The cases heretofore cited have tended to show that, besides North Carolina, the courts of the states of Arkansas, Indiana, Mississippi, New Mexico and Virginia have either failed to follow, or have misinterpreted the doctrine announced by this court in the Tumey Case. *Hill* v. *State*, supra; *State* v. *Shelton*, supra; *Hitt* v. *State*, supra; *State* v. *Gonzales*, supra; and *Brooks* v. *Potomac*, supra.

> "It is the design of the law to maintain the purity and impartiality of the courts, and to insure for their decisions the respect and confidence of the community * * * After securing wisdom and impartiality in their judgment, it is of great importance that the courts should be free from reproach or the suspicion of unfairness. The party may be interested only that his particular suit should be justly determined; but the state, the community, is concerned not only for that, but that the judiciary shall enjoy an elevated rank in the estimation of mankind." *Oakley* v. *Aspinwall*, 3 N. Y. 547.

There is probably no single factor which has contributed so largely toward the lowering of the respect and confidence of the general public of the State of North Carolina in our system of jurisprudence than the procedure which now prevails in this state in the trial of criminal cases before Justices of the Peace. The gross injustice and unfairness of trials of petty criminal offences in these so-called courts is almost entirely attributable to the vicious fee system which is allowed to exist.

It is apparent that the guidance and assistance of this court must be obtained in order that the petitioner and the people of the State of North Carolina may have the word of the highest judicial authority of the land upon the question of the rights, privileges and immunities guaranteed by the Fourteenth Amendment.

Respectfully submitted,

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